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No. 71-1344

In the Supreme Court of the United States

OCTOBER TERM, 1971

MICHAEL DE TORE, A/K/A MICHAEL HAYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1972. On March 21, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 18, 1972, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was improperly prejudiced because two admitted accomplices testified after they had pleaded guilty but before they were sentenced.

2. Whether in the circumstances of this case it was error for the trial judge to allow cross-examination of petitioner and testimony by an FBI agent concerning statements made by petitioner to that agent following petitioner's arrest.

3. Whether the trial judge's summary of certain evidence in response to a question from the jury was proper.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of having aided and abetted an armed bank robbery, in violation of 18 U.S.C. 2113(d) and 2, and was sentenced to ten years' imprisonment. The court of appeals affirmed without opinion (Pet. App.).

1. On the morning of February 3, 1971, petitioner met with Hiram Berenguer, Eugene Schwartz, and John Peters in the kitchen of his home to discuss the proposed robbery of the Eastern National Bank at Lake Grove, New York (T. 8, 306). According to Schwartz and Peters, who were confessed accomplices, petitioner planned the robbery and the method of the escape. He described the physical layout of the bank, how the armed robbery would be executed, and explained the proposed getaway and how the money was to be divided (T. 8–10, 307–308). Schwartz asked who

would supply the guns for the robbery and petitioner responded that he would (T. 308). At this point, petitioner went out to his back yard and returned with a metal box containing guns, handcuffs and mace. Together with a brown bag, these items were given to Peters and Schwartz, who were to carry out the actual robbery (T. 11, 309–310). After the robbery the guns and money were to be put in the bag and then given to petitioner who would be waiting near the bank as the robbers fled (T. 310).

The four men, riding in two cars, went to the bank. Peters and Schwartz parked in the bank parking lot while petitioner and Berenguer parked across the street in a shopping center (T. 23). The robbery was not attempted because Peters and Schwartz were frightened by a construction worker who was working near the bank (T. 23, 313–314).[1] Peters and Schwartz left the parking lot and returned with petitioner and Berenguer to petitioner's home. Petitioner reassured the men that "the job was not blown and that he would call the two guys * * * when the job would be right" (T. 315). Schwartz then returned the guns, handcuffs, mace and bag to petitioner (T. 24–25).

On the morning of February 8, 1971, Schwartz, Berenguer and Stuart Simon (a replacement for Peters) decided to try again to rob the Eastern National Bank (T. 158). Berenguer telephoned petitioner and told him that they were coming to get the guns

[1] The worker observed two men in a car whom he considered to be acting suspiciously. He reported this to the bank manager and gave him the license number of the car (T. 262–264).

(T. 391). After the men arrived at petitioner's home, Simon was informed by petitioner of the physical layout of the bank (Tr. 161–162). Petitioner then explained a revised plan. Schwartz and Simon were to drive to the bank and park (T. 165), and petitioner and Berenguer would park across the street. Schwartz and Simon were to enter the bank (T. 165), and Simon was to jump on the counter, scoop up the money and put it in the bag which petitioner had given him (T. 44). Schwartz and Simon were both told by petitioner to spray mace into the eyes of the bank employees and customers so that they would be unable to see the men make their getaway (T. 165). The men were to leave the bank and drive away in Schwartz's car; petitioner would overtake them, and Schwartz was then to throw the bag containing the money, guns, and mace into petitioner's car (T. 51–52, 165–166).

The men left petitioner's home and proceeded to the bank (T. 53, 169). Schwartz and Simon entered the bank brandishing the fully loaded revolvers which had been supplied by petitioner and ordered all employees and customers to "freeze" and lie on the floor. They then took approximately $12,746 (T. 295–296). As Schwartz and Simon drove away from the bank, petitioner's car was behind them (T. 56, 173). The cars pulled alongside each other and Simon handed the bag containing the money, guns, and mace to petitioner. At the next intersection, the cars parted and went separate ways. (T. 57–58, 173–175). The next day (February 9, 1972) petitioner's back yard was searched pursuant to a search warrant. The executing

officer found a grey metal box containing several revolvers, handcuffs and mace. Petitioner's fingerprints were on the box (T. 282, 285–286, 288).

2. On February 9, 1971, the F.B.I. dispatched Special Agent Long to the Suffolk County Police Department to transport petitioner, who had been arrested the night before, to the federal courthouse in Brooklyn for arraignment (T. 435–436). During the trip, Agent Long furnished petitioner with a form explaining his constitutional rights, which he observed petitioner reading. When Long asked petitioner if he understood the contents of the form, petitioner answered affirmatively, but returned the form unsigned (T. 430, 451–452). Long then asked petitioner about the robbery of the Eastern National Bank. Petitioner stated that Berenguer had visited him at his home about a week before the robbery and had left several revolvers there. From this, petitioner surmised that Berenguer was preparing to pull a job. Petitioner also stated that on the morning of the actual robbery, Berenguer and two other men came to get the guns and asked him if he wanted to drive the getaway car; they did not specify where they were going (T. 453). He told the agent that Berenguer returned to petitioner's house later that day, and that petitioner drove him to Queens, and indicated that if he made bail, he would attempt to get the guns and money and turn them over to the F.B.I. (T. 454).

ARGUMENT

1. Petitioner contends that since both Schwartz and Simon, who had pleaded guilty to violating 18 U.S.C. 2113(b) prior to petitioner's trial, had not yet been

sentenced at the time they testified at trial, the truthfulness of their testimony was so suspect as to deny him a fair trial. This contention is without merit. It is settled that a conviction may rest solely on the testimony of an accomplice (see *Caminetti* v. *United States*, 242 U.S. 470, 495), and that the fact that the accomplice may have expected to receive a lesser penalty for testifying does not render his evidence unacceptable (see *Caton* v. *United States*, 407 F. 2d 367, 371 (C.A. 8), certiorari denied, 395 U.S. 984, and cases cited). The trial judge here took special care in his charge to alert the jury of the witnesses' admitted participation in the crime and instructed the jury that it should take into account the fact that since Schwartz and Simon were still subject to punishment, they were amenable to suggestion by the government and might "try to court the prosecutor's favor to avoid some punishment themselves" (T. 500–521).

2. Petitioner claims that it was reversible error for the trial judge to permit the government to cross-examine him regarding his conversation with Agent Long, as well as to permit Long to testify in rebuttal with respect to that conversation.

On several occasions during direct and cross-examination, petitioner denied that he had ever discussed the robbery of the Eastern National Bank with Berenguer, Schwartz or Simon and stated that he was unaware that there was a plan to rob it (T. 372, 374–375, 378, 389, 393). In the face of petitioner's persistent denials of participation in the robbery and of any knowledge thereof, the prosecutor proceeded to question petitioner about his conversation with Agent

Long (T. 394). When defense counsel objected to this line of questioning, the trial judge instructed the jury (T. 396) that:

> * * * any statements that may be asked on cross-examination which suggest that this defendant said something at an earlier date which is contradictory of what he now says, may be used by you only in assessing the credibility of this witness and not in determining the truth of what happened on that prior occasion.

Petitioner then testified that he did not remember if he had been advised of his rights by Agent Long or if he had told the agent that he knew that Berenguer was preparing some sort of robbery and that he had been asked to go along as the driver of the getaway car on the job (T. 398–401). He first denied telling the agent that he had been asked to drive the getaway car (T. 403), but then stated that he did not recall (T. 409). At this point the prosecutor asked to call Agent Long as a rebuttal witness, relying on *Harris* v. *New York,* 401 U.S. 222 (T. 411). While the court recognized that *Harris* permitted direct impeachment of the defendant (T. 412), he questioned whether that decision authorized the agent's testimony.

To obviate the problem, a hearing was conducted outside the presence of the jury to determine whether the statements were made to Agent Long after compliance with the requirement of *Miranda* v. *Arizona,* 384 U.S. 436 (T. 424, 429). Agent Long, a member of the Ohio bar, told the court that he had given petitioner the full *Miranda* warnings in writing, that petitioner appeared to read the form and

stated that he understood his rights, and that petitioner would not sign the form (T. 429–430). While petitioner did not testify at this point,[2] he had earlier testified during cross-examination that he could not remember if Agent Long had advised him of his rights. The judge ruled that he had been so advised and, accordingly, that the *Miranda* requirements had been satisfied (T. 444–445).

Under *Harris* (see also *Walder* v. *United States*, 347 U.S. 62), the statements made by petitioner to Agent Long were admissible for impeachment[3] even if petitioner did not receive *Miranda* warnings; since the evidence was sufficient to support the district court's finding that petitioner had received and understood such warnings, the statements were also admissible under *Miranda*.

3. During the jury's deliberation, a note was sent to the court which asked "What two cars were used at the bank, and color and make" at the time of the robbery (T. 529). Initially, the trial judge called the jury into the courtroom in order to clarify what they wanted to know. After several of the jurors indicated that they wanted to hear all the testimony on the second car (T. 535–537), he excused them while he

[2] The trial court had advised defense counsel that he would not believe whatever petitioner said on this matter (T. 433).

[3] Despite the compliance with the *Miranda* requirements, the statements were introduced solely on the question of credibility (T. 519–520).

and counsel determined how the question was to be answered (T. 537–539). Petitioner's counsel suggested that the judge advise the jury "what one witness said, as stated, it was a dark blue General Motors car," and pointed out that, while "the other witness said it was a dark blue Pontiac at the trial" he had not made such a precise identification in a pre-trial statement given to the government (T. 540–541). The judge then proposed an answer which incorporated defense counsel's suggestion, and reviewed it with counsel. Petitioner's counsel stated that the proposed answer was "all right" (T. 543); the jury was recalled and the answer was read to them (T. 543–544).

Petitioner now asserts that this answer to the jury's question was error on the ground that it was incomplete and made no reference to the witnesses by name. Since defense counsel agreed to the proposed answer and made no objection either before or after it was given, petitioner should not now be heard to complain. See Rule 30, Fed. R. Crim. P. In any event, it is within the broad discretion of the trial judge to determine whether the testimony in issue should be read to the jury in its entirety or summarized. There has been no showing that petitioner was prejudiced because the court, with the agreement of counsel, decided to summarize the evidence. Compare *United States* v. *Brexton*, 417 F. 2d 878, 880 (C.A. 5); *United States* v. *De Palma*, 414 F. 2d 394, 396–397 (C.A. 9), certiorari denied, 396 U.S. 1046.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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